PUBLIC MATTER –DESIGNATED FOR PUBLICATION

FILED OCTOBER 4, 2001

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	Case No.: 94-O-11471
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	)	
EMIR PHILLIPS,	)	OPINION ON REVIEW
	)	
	)	
A Member of the State Bar.	)	
	)	

In this disciplinary proceeding, respondent Emir Phillips seeks review of a hearing judge's decision finding respondent culpable of 12 charged acts of misconduct and recommending that he be disbarred. Respondent challenges most, though not all, of the hearing judge's adverse factual findings and legal conclusions.

We independently review the record before us in this matter. (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207.) Our review discloses that respondent began to commit professional misconduct soon after he was admitted to practice, that he committed a wide range of misconduct, and that the misconduct was surrounded by little evidence in mitigation, but significant evidence in aggravation. We conclude that the recommendation of disbarment is warranted under the circumstances for the protection of the public, the courts, and the legal profession.

BACKGROUND

Respondent was admitted to practice law in California in June 1991 and has no prior record of discipline. At all relevant times, respondent had his own law practice which appears to

have included a variety of cases involving probate, real estate, medical malpractice, personal injury, workers' compensation, immigration, education, disabled veterans, and civil rights. Although it is not clear whether respondent employed other attorneys, respondent did employ a nonattorney office staff to assist him.

CULPABILITY

In their briefs, the parties on review included discussions as to aggravation pertaining to each matter along with discussions regarding culpability. However, because issues concerning aggravating circumstances differ from those involving culpability, where aggravating evidence surrounds a specific matter, we defer our discussion of such aggravation to our discussion of all aggravating circumstances.

The Benjamin Matter

Lyric Benjamin Dill (Benjamin), a student with a part-time job, contacted respondent through the Los Angeles County Bar Association's Modest Means Referral Service.[1] Benjamin's father had died without a will, and Benjamin and her mother met with respondent on February 12, 1993.

At this initial meeting, she retained respondent to handle the probate of a house and a car. At that time, respondent asked who had title to the house and whether Benjamin's mother was married to Benjamin's father at the time of the father's death. Benjamin's mother informed respondent that she and Benjamin's father were divorced in 1979. Respondent told Benjamin that he would take the case and that he would charge her $500 to obtain a court date. Benjamin's mother gave respondent a $500 check.

[1]We base our findings in this matter primarily upon the testimony Benjamin gave in the hearing department. As we will discuss, the hearing judge found Benjamin's testimony to be credible.

In order to keep legal fees down, Benjamin obtained the deed of trust for her father's house for respondent and forwarded it to him on February 13, 1993. Subsequently, over a period of approximately six to seven weeks, Benjamin left over twenty messages on respondent's office answering machine asking whether respondent had obtained a court date. She received no response. She finally spoke with respondent at the end of March by calling him on a Sunday and set up a meeting for April 2, 1993.

At the meeting of April 2, respondent told Benjamin he had not obtained a court date but was working on the case. He also told Benjamin he was " 'going to get a petition concerning the estate' " and requested an additional $1,500 in legal fees and another $250 for court costs. Benjamin asked respondent for a contract and an itemized bill so she could determine how respondent had spent the $500 she had previously paid to him, but she never received a bill.

They next met on April 9, 1993. At that time, respondent presented Benjamin with a retainer agreement. At the time he prepared this agreement, he planned to be paid $2,000 for his services and did not even know whether the agreement was legal. Respondent had signed the agreement and pressured Benjamin to sign as well, but she took it home to review it first. Paragraph four of that agreement indicates that respondent was to receive $40 per hour to handle the "succession of Moses Benjamin's residence and all related probate matters." Benjamin never signed the agreement.

At some point during this time, respondent reviewed documents in this case and performed research on the matter.

Benjamin spoke with respondent on the telephone on April 16, 1993. At that time, she informed him that she no longer wanted him to represent her and requested a refund of the money previously paid. He refused to refund any money and told Benjamin she could "take him to Small Claims Court because he hasn't lost a case there yet." On April 23, 1993, she mailed respondent a letter reiterating that she no longer wanted him to act as her attorney and again

requested a refund. Subsequently, Benjamin contacted the Los Angeles County Bar Association Dispute Resolution Services in an effort to obtain a refund of the $500 paid to respondent. Although respondent did not appear at the fee arbitration hearing on December 3, 1993, he sent a written response to the arbitrator. After the hearing, Benjamin was awarded the $500 plus $50 for the arbitration fee. Benjamin tried to call respondent to collect the money, but when she was able to contact him on the telephone, he hung up on her. Respondent finally paid Benjamin the amount awarded in arbitration plus interest in February 1997.

In contrast to the foregoing, respondent testified that, at their initial meeting, Benjamin's mother indicated to him that she wanted to transfer title to her house to Benjamin, and therefore respondent believed that the matter essentially involved a real estate issue. He also testified that it was not until the second meeting that he discovered that Benjamin's parents were divorced when Benjamin's father died and that he then obtained and reviewed the divorce documents, subsequently concluding that the case instead involved probate issues. He additionally testified that neither Benjamin nor her mother ever hired him to handle the probate matter and that he never hung up on Benjamin.

In this client matter, respondent was charged with violating Rules of Professional Conduct, rule 4-200(A)[2] (entering into an agreement for, charging, or collecting an illegal fee – count one); rule 3-700(D)(2) (failing to refund an unearned fee after employment terminated – count two); and Business and Professions Code section 6068, subdivision (i)[3] (failing to cooperate and participate in disciplinary investigation and proceeding – count three). The charged

[2]All further references to rules are to the Rules of Professional Conduct of the State Bar unless otherwise indicated.

[3]All further statutory references are to the Business and Professions Code unless otherwise indicated.

violation of section 6068, subdivision (i), was properly dismissed by the hearing judge upon motion of the State Bar prior to trial.

In his decision, the hearing judge found Benjamin to be "a very credible witness with a very good recall of dates and events." The hearing judge also found respondent's credibility in this matter to be lacking in some respects. The hearing judge found lacking in credibility respondent's assertion that he believed this matter was governed by Probate Code section 13660 and respondent's testimony that he was retained to represent Benjamin only in a simple real estate matter rather than in a probate matter. We give substantial weight to the credibility determinations made by the hearing judge, who saw and heard the parties testify. (Rules Proc. of State Bar, rule 305(a) [review department gives great weight to hearing judge's findings resolving issues of credibility]; *Franklin v. State Bar* (1986) 41 Cal.3d 700, 708.) Thus, as previously indicated, our findings in this matter are based upon Benjamin's testimony. With respect to conflicts in the testimony, we find that, at the first meeting, respondent was retained to handle the probate of the house and car and was informed that Benjamin's parents were divorced when Benjamin's father died. We reject respondent's testimony that Benjamin's mother told him she wanted to transfer title to her house to Benjamin, that Benjamin never retained respondent to handle the probate matter, and that respondent never hung up on Benjamin. However, because there was no conflict in the evidence, we find that respondent performed some work on Benjamin's case and did not know at the time of drafting the retainer agreement whether it was legal.

The hearing judge concluded that respondent was culpable of agreeing to, charging, or collecting an illegal fee on the grounds that the matter was a probate case and that attorney fees in such cases must be approved by the probate court pursuant to Probate Code sections 10810

and 10830.[4] Respondent challenges this conclusion on the grounds (1) that his initial fee of $500 was paid and earned before he learned that the matter would involve probate so that his subsequent request for an additional fee did not change the nature of this $500 fee and (2) that the foregoing Probate Code sections do not address whether they apply to payment for preliminary services performed prior to filing the probate matter.

However, we agree with the hearing judge's conclusions. Even assuming arguendo that it was not initially clear to respondent at the first meeting on February 12, 1993, that Benjamin's case was a probate matter, he knew by the third meeting on April 9, 1993, that the matter involved probate. Nevertheless, at that time, he proffered to Benjamin a retainer agreement which, according to the evidence, applied the initial $500 fee to the total fee of $2,000 to be paid in advance for a probate matter. Therefore, the $500 fee was charged at that time without court approval for work to be performed in a probate case, in violation of Probate Code sections 10810 and 10830. Moreover, because respondent charged the $500 fee at that time for services to be performed subsequently in a probate matter, it is irrelevant whether the Probate Code fee limit sections apply to payment for preliminary services. Consequently, we adopt the hearing judge's holding that respondent is culpable of willfully charging an illegal fee in violation of rule 4-200(A).

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[4]Probate Code section 10810 provides as relevant that "for ordinary services the attorney for the personal representative [of the probate estate] shall receive compensation based on the value of the estate accounted for by the personal representative . . . ." Probate Code section 10830 provides in relevant part that, at any time after four months from the issuance of letters in the probate matter, an attorney may file a petition for "an allowance on the compensation of the attorney for the personal representative." Furthermore, under section 10830, notice of a hearing on such a petition must be given to various parties having an interest in the estate which would be affected by the payment of the compensation, and the court *must* issue an order allowing any such compensation. Moreover, we note that Probate Code section 10813 provides that an agreement between the personal representative of the estate and the attorney for greater compensation than that provided for in the Probate Code is void. These three sections were all operative as of July 1, 1991, prior to the time Benjamin employed respondent.

The hearing judge dismissed the charge of failing to refund an unearned fee, finding no clear and convincing evidence as to that charge. As stated at the outset of this opinion, we independently review the record. That is, although we give great weight to the hearing judge's credibility determinations, we need not adopt the hearing judge's factual findings and legal conclusions. After considering the hearing judge's reasons for this dismissal, the evidence, and the law, we conclude that the hearing judge erred in dismissing this charge.

The sole reason the hearing judge gave for dismissing this charge was that respondent obtained various documents. Although we also note that respondent met with Benjamin three times and testified that he performed research on the matter, the retainer agreement he presented to Benjamin provided that he would perform legal services in this matter for only $40 per hour. While we recognize that Benjamin never signed the retainer agreement, it nevertheless appears that this was the amount respondent quoted to Benjamin as his compensation rate. At that rate of pay, even assuming that respondent spent several hours performing research and obtaining documents in addition to meeting with Benjamin three times, he did not earn the $500 paid by Benjamin's mother. Respondent would have been required to work 12.5 hours to earn that fee at the rate of $40 per hour, and the evidence does not establish that respondent spent anywhere near that amount of time meeting with Benjamin and working on Benjamin's case. For example, there is no specific evidence regarding what research respondent performed or how many of the documents introduced into evidence were actually obtained by respondent instead of by Benjamin.

Moreover, Benjamin hired respondent to obtain a particular goal, i.e., a transfer of her father's assets to the heirs of his estate. Respondent failed to achieve or take concrete steps toward this goal. To justify retention of legal fees, respondent was required to perform more than minimal preliminary services of no value to the client. (See *In the Matter of Myrdall* (Review

Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 377.) Here, the record fails to support a finding that respondent performed any services of value to Benjamin.

We note additionally that respondent had the opportunity to defend against Benjamin's claim that he did not earn the $500 fee and to present evidence on the issue to an independent, neutral arbitrator prior to these proceedings; yet respondent failed to convince the arbitrator that he earned the fee. While we do not give the arbitration award conclusive effect in these proceedings, respondent's failure to present sufficient evidence in the arbitration proceedings that he earned the fee supports our conclusion, based upon the evidence before us, that he did not earn the fee.

In view of the fact that the record indicates respondent earned little of the $500 fee, we need not decide the precise amount of the fee which respondent earned through his services to Benjamin. Because we conclude that respondent did not earn the $500 fee and that he failed to refund promptly any portion of it to Benjamin after termination of his employment, we conclude that respondent was culpable of willfully violating rule 3-700(D)(2).

In any event, respondent could not have earned any fee in this probate case absent court approval. This proposition is established by *Alberton v. State Bar* (1987) 43 Cal.3d 638, 639-640. In that case, Alberton was appointed as the attorney for the estate of a Mr. Vivian Skogsberg in accordance with a specific provision in Skogsberg's will providing for his appointment. Shortly after Skogsberg's death, Alberton met with Skogsberg's widow (Mrs. Skogsberg). At that meeting, Alberton requested $600 in attorney fees from Mrs. Skogsberg even though no probate proceeding had been initiated and no court approval had been obtained. Mrs. Skogsberg paid Alberton the $600 in attorney fees at that same meeting. Thereafter, Alberton withheld and kept, as additional attorney fees, approximately $1,200 in trust funds that he received on behalf of Skogsberg's daughter. The Supreme Court held that even though "the total amount of fees taken – approximately $1,800 – was not unconscionable, the failure to have obtained court approval

rendered it misappropriation." (*Id*. at p. 640; see also *Tarver v. State Bar* (1984) 37 Cal.3d 122, 126-127.) While normally an attorney who is discharged is entitled to recover the reasonable value of the services actually rendered up to discharge (*Fracasse v. Brent* (1972) 6 Cal.3d 784), such a recovery has been denied in other contexts where prior court approval of attorney fees is statutorily required, but not obtained (see *In re Occidental Financial Group, Inc.* (9th Cir. 1994) 40 F.3d 1059, 1063 [quantum meruit remedy generally unavailable where attorney fees barred by law under bankruptcy rules]).

The Brown Matter

In June 1993, Carol Brown hired respondent to represent her minor daughter Tamekia Brown (Tamekia) in a medical malpractice matter. The alleged malpractice occurred in April 1993 when Tamekia was 16.

At some point, respondent entered into settlement negotiations with the insurer on behalf of the Browns. The insurer offered a structured settlement in the amount of $105,000, which offer respondent thought Brown should accept, but Brown did not sign the agreement.[5] Had the offer been accepted, respondent's fees would have been "somewhere in the ballpark of 20 percent."

In April 1994, Brown and Tamekia went to the office of an attorney named Michael Baker and hired him to represent them in the medical malpractice case. On April 18, 1994, Baker sent a letter to respondent stating that the Browns had retained him to represent them in the medical malpractice matter and asking respondent to forward to him the Browns' file. Baker understood that respondent had engaged in settlement negotiations regarding the matter and "that he had arrived at a figure that he wished the Browns to accept and they did not want to accept."

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[5]Respondent testified he "thought [Brown] would come to her senses" and sign the agreement.

Baker followed up on his letter of April 18, 1994, by telephoning respondent's office. Although respondent received the April 18, 1994 letter, respondent did not respond to it. Nor did he return Baker's telephone calls. Instead, he filed a civil complaint on behalf of the Browns in April 1994.

Unaware that respondent had already filed a complaint for the Browns, Baker filed a complaint on June 10, 1994, because he was concerned about the statute of limitations, in view of the Browns' statements to him that they had become alarmed about Tamekia's medical condition between April and May or early June 1993.

Between May 11, 1994, and September 16, 1994, Baker sent respondent six more letters requesting documents pertaining to the Browns' case. In addition, in September 1994, after Baker discovered that respondent had filed a civil complaint in April 1994 on behalf of the Browns, Baker repeatedly requested that respondent complete a substitution of attorney form. Baker finally received a signed substitution of attorney form from respondent on September 23, 1994, but never received some of the documents he requested from respondent.

As to this client matter, respondent was charged with violating section 6068, subdivision (m) (failing to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services – count four) and rule 3-700(D)(1) (failing promptly to release to clients upon request all client papers and property – count five). The hearing judge correctly dismissed the charge of violating section 6068, subdivision (m) (count four) upon motion of the State Bar prior to trial, and we do not discuss that charge further.

With respect to the charge of failing to release the Browns' file promptly upon request, respondent asserts that, although he received a letter from Baker requesting the file in April 1994, he was not culpable of the charge because he forwarded the file to Baker as soon as he received evidence that his former clients authorized him to do so. According to respondent, the first notification he received from his clients that they had retained Baker as their new counsel came

in September 1994, when he received a substitution of attorney form signed by Brown, and it was only at that time that he became obligated to forward the file to Baker.[6]

We disagree with respondent's assertion. It is settled that the client has an absolute right to retain counsel of choice and may discharge his or her attorney at any time, with or without cause. (*Fracasse v. Brent*, *supra*, 6 Cal.3d at pp.790-791.) It is reasonable to assume that when new counsel is retained, he or she will be able to communicate with and obtain the client's file from former counsel. While former counsel has the right and duty to ensure that the new attorney is acting with the client's consent, the record here shows no lack of willingness on the part of Baker to respond to any questions from respondent. Indeed, Baker attempted to communicate with respondent from April through August 1994 before receiving a response from respondent in September 1994. Notwithstanding respondent's argument that he lacked client authorization, respondent made no effort to obtain from Baker either more specific proof that Baker had been hired by the Browns in the medical malpractice case or permission to contact the Browns to verify their authorization. Instead, respondent took no timely action, and we conclude that respondent's argument in this respect lacks merit. Although respondent also asserts he ultimately turned over all papers regarding Tamekia's claim, he did not do so until after Baker made repeated requests for the documents.

In *In the Matter of Sullivan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 608, 612 we held that Sullivan had violated rule 3-700(D)(1) when his client's new counsel requested the client file in November 1992 and Sullivan failed to deliver the file to new counsel until May 1993. We stated: "Even without the substitution of attorney respondent was on notice that the file

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[6]Respondent testified he did not receive any indication from Brown or Tamekia in April 1994 that they had hired another attorney. He testified that, in September 1994, he received a substitution of attorney form signed by Brown, which was the first acknowledgment from his clients, written or otherwise, that they wished to retain a new attorney. He testified that, although the substitution of attorney form was not signed by Baker, respondent signed the form in good faith and sent the Brown file to Baker.

should be prepared for delivery by the November letter [from counsel]." (*Ibid*.) Similarly, here, as previously stated, Baker requested the file in April 1994, but respondent failed to provide any documents to him until September 1994. Even without any formal substitution of attorney signed by Brown, respondent was notified by Baker's letter of April 1994 that the file should be forwarded to Baker. His failure to do so, without taking any action whatsoever to determine whether Baker was authorized to request the Browns' file, constituted a willful violation of rule 3-700(D)(1).

The Orozco Matter

Rene Orozco, who was not an attorney, provided nonattorney immigration services to clients. In February 1994, Orozco's secretary, Monica Monatas, introduced Orozco to respondent. At their meeting, Orozco and respondent agreed that Orozco would refer all personal injury and workers' compensation matters to respondent. Respondent and Orozco agreed to share evenly any amounts respondent received from personal injury cases. In addition, respondent was to appear in any deportation cases, and he would be paid by Orozco's office. Respondent and Orozco were also to establish a joint banking account for the deposit of settlement money in the personal injury cases.

In April 1994 Orozco received a letter which appeared to be from respondent. This letter reflected, with a few errors, the agreement between respondent and Orozco.

Orozco paid all of the rent and utilities at his Santa Ana office, as well as the salary of Monatas, although respondent began to work there part-time.

Pursuant to their agreement, a joint banking account was opened in May or June 1994. Both respondent and Orozco initially placed $100 into the account. Subsequently, settlement drafts from insurance companies in a personal injury case were sent to respondent at the Santa Ana office, and respondent endorsed the drafts and deposited the amounts into the joint banking

account. Orozco maintained the check register and wrote checks on the account. Both Orozco and respondent had signature authority on the account. In August 1994 respondent unilaterally closed the account and removed approximately $6,000 remaining in the account. As a result, several clients did not receive settlement money to which they were entitled. At that time, Orozco told respondent to stay away from the Santa Ana office and changed the locks at that location.

Between February and August 1994, respondent spent less than four hours per week at the Santa Ana office, sometimes failing to show up for client appointments scheduled with him. As a result of respondent's failures to appear for appointments, Orozco sometimes had to obtain client information and reschedule client appointments. Also, between February and July or August 1994, Orozco referred thirty nine personal injury cases and between three to five workers' compensation cases to respondent, and respondent appeared in two deportation cases.

As to this matter, respondent was charged with violating rule 1-300(A) (aiding in the unauthorized practice of law – count six), rule 1-320(A) (sharing legal fees with a nonlawyer – count seven), and rule 1-310 (forming a law partnership with a nonlawyer – count eight). As no evidence was presented as to count six, its charges were properly dismissed at trial by the hearing judge upon motion of the State Bar.

Respondent does not challenge the hearing judge's conclusions of culpability as to the charges set forth in counts seven and eight, and after independently reviewing the record, we adopt those conclusions and the associated findings establishing them. Orozco's uncontradicted testimony established that he was not a lawyer, yet he and respondent agreed to share evenly all legal fees recovered in personal injury cases. Such evidence establishes a willful violation of rule 1-320(A). Moreover, the evidence outlined above regarding the business arrangement, in which respondent and Orozco maintained a joint checking account, Orozco referred certain legal matters to respondent, respondent and Orozco shared fees earned by respondent, and respondent

was paid for other legal work by Orozco, indicates that respondent formed a law partnership with Orozco in willful violation of rule 1-310.

Respondent instead challenges only certain negative underlying findings made by the hearing judge. He asserts that although the hearing judge's decision does not indicate that the findings formed an independent ground for discipline or were considered in aggravation, we should nevertheless delete the hearing judge's findings that respondent closed the account at Bank of America, took all of the $6,000 in the account, and failed to distribute the funds therein to the clients of the Santa Ana office to whom such funds belonged, resulting in these clients not being properly paid and complaining to Orozco. Respondent bases his assertion on the grounds that no such matters were charged, the evidence regarding these matters was not elicited for the purpose of inquiring into the cause of the misconduct which was charged, and respondent "appropriately objected" to the evidence regarding these matters as speculation and beyond the scope of the matters charged.

However, it appears that the evidence regarding these matters was elicited for the relevant purpose of proving the charges in this matter. In other words, the evidence about which respondent complains, when taken together with the other evidence regarding this matter, further demonstrates that respondent entered into a law partnership with Orozco and that respondent shared legal fees with Orozco. Thus, we reject respondent's apparent assertion that the challenged evidence was irrelevant to the charged misconduct.

Moreover, notwithstanding respondent's assertion that "these findings cast [him] in a negative light," we conclude that because the findings did not result in an additional ground of discipline or aggravation, respondent has failed to demonstrate any specific or actual prejudice that would entitle him to any relief on review. (Cf. *Farnham v. State Bar* (1976) 17 Cal.3d 605, 609.) Under these circumstances, we decline to strike from the decision the hearing judge's

findings based on the evidence of which respondent complains. (See *In the Matter of Kopinski* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 716, 724.)

In addition, contrary to respondent's argument, our review of the record indicates that respondent's evidentiary objection was neither timely nor specific, and therefore, the evidence need not be disregarded. (*Bowles v. State Bar* (1989) 48 Cal.3d 100, 108-109; *Palomo v. State Bar* (1984) 36 Cal.3d 785, 793; see *In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 41; *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 522.)

As to timeliness, a party must object to a question, rather than making a motion to strike after the answer is given, "[w]hen the nature of [the] question indicates that the evidence sought is inadmissible." (*People v. Perry* (1972) 7 Cal.3d 756, 781.) " 'A party cannot hazard whether the reply of a witness to an objectionable question will be favorable or unfavorable to him, and when it appears unfavorable then object to it. He must object when the question is asked and before the answer is given, and if he does not, he waives his right to complain of the admission of the testimony under the answer.' [Citation.]" (*Ibid*.) Here, respondent failed to object when Orozco initially testified that respondent closed the bank account. When Orozco then added that respondent withdrew all of the funds without ever properly distributing them to the clients, respondent made a motion to strike on the sole ground that such testimony was speculation, arguing that Orozco had not named "one single client that wasn't paid." When the State Bar then asked Orozco to identify the clients who did not receive money to which they were entitled, respondent did not object. It was only after Orozco had identified the clients and moved on to other testimony, including testimony regarding the method of distributing the checks from insurance companies and the amount of money respondent had taken, that respondent objected "as to these clients based on the fact that it's beyond the scope of the charges against me as well as the fact that he has already testified that every client was paid right away and so it conflicts

with his prior testimony." Because the State Bar's questioning referred to above clearly asked for the identity of the clients who were not paid as a result of respondent's actions, respondent's objection, made after Orozco had concluded his testimony regarding the clients and had moved on to other testimony, was untimely.

In addition, as the foregoing description of respondent's objections demonstrates, respondent never specifically objected to Orozco's testimony that respondent closed the account and took the $6,000 remaining in the account. " '[T]he party who desires to raise the point of erroneous admission [of evidence] on appeal must object at the trial, specifically stating the grounds of his objection, and directing the objection to the particular evidence which he [properly] seeks to exclude.' [Citation.]" (*People v. Harris* (1978) 85 Cal.App.3d 954, 957, italics omitted; see also *Haskell v. Carli* (1987) 195 Cal.App.3d 124, 129.) Therefore, respondent has failed to preserve for review the issue of the inadmissibility of the evidence.

In view of the foregoing, we need not strike from the hearing judge's decision the challenged findings.

The Campos/Melendez-Arreola Matter

Thelma Campos went to an office in Santa Ana to hire respondent to complete some paperwork regarding an immigration matter for her husband, Melendez-Arreola.[7] When she arrived at the office, she saw the words "Emir Phillips and Associates" on the door and some business cards bearing respondent's name in the reception area. Although she made several appointments with respondent, he never appeared and never returned any of her telephone calls.

[7]We base our findings in this matter upon the testimony Campos gave in the hearing department, which testimony the hearing judge found to be credible.

Instead, the secretary at the location, Monatas, told Campos to fill out certain forms for respondent, and Campos gave Monatas $375. Campos paid an additional $375 on April 26, 1994, plus, at some point, an additional $75 filing fee. Campos met with Monatas approximately five times, sometimes with her husband there. Although Campos was aware of Rene Orozco being at the Santa Ana office, she had no dealings with him.

Because respondent was never available and never returned her calls, Campos called "[a] couple [of] months" later and stated she was a new client. At that time, she was able to speak with respondent. She told him that she wanted her money back because he had not done anything for her. She also told him she was going to send a letter to the State Bar due to his failure to perform the services for which he was retained, and he treated her statement "like a joke" and hung up on her. She never received a refund of any part of the money she paid to respondent.

In his pretrial statement, respondent represented he had paid Campos back in full. However, respondent testified at the hearing that that statement was probably a mistake.

As to this matter, respondent was charged with violating rule 3-110(A) (intentionally, recklessly, or repeatedly failing to perform legal services competently – count nine), rule 3-700(D)(2) (failing to refund unearned fee after employment terminated – count ten), and rule 4-100(B)(4) (failing to promptly deliver client's funds, i.e., the $75 filing fee, upon request by client – count eleven). The hearing judge found respondent culpable of all of these charges.

Respondent asserts that these counts should be dismissed because there is no clear and convincing evidence that he ever represented either Campos or her husband. In making this assertion, respondent merely "advances his version of the evidence." (*In the Matter of Koehler*

(Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 627.) However, where there is a conflict in the testimony, the hearing judge is "in a particularly appropriate position to resolve that conflict. [Citation.]" (*Ibid*.; *Gary v. State Bar* (1988) 44 Cal.3d 820, 826.) "[O]ur rules on review require that we give great weight to the judge's findings in such a matter and we are given no good reason to reach a different result." (*In the Matter of Koehler*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 627; *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 774-775.)

Respondent focuses primarily upon evidence that the Santa Ana office was Orozco's office, that Monatas worked for Orozco at that time and not for respondent, that the second receipt indicates that payment was made to Orozco, that respondent did not recall the case, and that Campos allegedly retained respondent to perform work which Orozco was to perform under the agreement between Orozco and respondent.[8] However, Campos testified credibly that she was referred to respondent at the Santa Ana office, went there intending to hire *respondent*, saw respondent's name on the door and some of his business cards in the reception area, and made several appointments with respondent. Although respondent never appeared for any of the appointments or returned Campos's calls, Monatas had Campos fill out forms for respondent.

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[8]Respondent testified that he believed Campos and Melendez-Arreola never retained him, but instead retained Orozco. He testified that although a receipt was issued to Campos and Melendez-Arreola on respondent's letterhead by Monatas, whom respondent subsequently employed for almost two years, Monatas did not work for respondent at the time the receipt was issued, and respondent did not authorize the issuance of the receipt on his letterhead. Respondent further testified he never met with Campos because he never knew he was supposed to meet with anyone. Moreover, he testified his name was not anywhere on the door or at the entrance to the Santa Ana office, and he did not believe there were any of his business cards in the reception area there. He also testified he did not recall speaking with Campos either in person or on the telephone.

Moreover, one of the two receipts for payment Campos received was on respondent's letterhead. Although respondent testified he did not authorize the preparation of a receipt on his letterhead and did not recall representing Campos or her husband, the hearing judge found his testimony with respect to this client matter to be lacking in credibility.

Furthermore, the memorialization of respondent's agreement with Orozco acknowledges that Monatas was to act as an employee of, or agent for, both respondent and Orozco with respect to certain matters. That document, which respondent drafted, states in relevant part that "Monica Monatas will have access to the bank account for the benefit of both Emir and Rene . . . ." In addition, we infer that respondent had a key to the office, since Orozco testified he changed the locks to the office upon the termination of his business relationship with respondent. Since Orozco testified that respondent visited and worked out of the Santa Ana office for at least a few hours each week, we find that respondent either knew or was grossly negligent in not knowing that the office was held out to the public as his office.

Finally, we note that in respondent's November 3, 1995 letter to the State Bar, respondent stated that at that time he was "assessing what work I and my office have done. I am more than willing to refund whatever I owe to Ms. Campos and/or her husband; however, at this time, I am looking at the file and the case to prepare a bill for you." This statement includes an explicit admission that respondent had the Campos file at that time, which is evidence that Campos was, in fact, a client of respondent's, as there would be no other reason for respondent to be in possession of the file after he was no longer in business with Orozco. Because the statement also indicates that respondent was in the process of assessing his work to prepare a bill, we view it as

an admission that respondent believed he had performed some work for Campos or her husband, also indicating that Campos retained respondent. At the very least, as pointed out by the hearing judge in his decision, respondent's failure to deny, upon accusation by the State Bar, that Campos was his client constitutes an adoptive admission of that fact. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1189-1190; *Bowles v. State Bar*, *supra*, 48 Cal.3d at p. 108.) We conclude the evidence clearly and convincingly establishes that Campos retained respondent to perform immigration work for her husband.

As to respondent's argument that the hearing judge should have sustained his hearsay objection to Campos's testimony regarding Monatas's statements to her, those statements to Campos were admissible as authorized statements pursuant to Evidence Code section 1222. That section provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and [¶] (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence." The authority of a declarant to make a statement for another " 'concerning the subject matter of the statement' can be implied, as well as express. [Citation.]" (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 570.) Whether such authority exists is to be determined from "the particular facts and circumstances of each case viewed in the light of the substantive law of agency . . . . [Citation.]" (*Ibid*.)

Here, as previously stated, Monatas acted as the agent of both Orozco and respondent at the time she was employed in the Santa Ana office. Moreover, as established in the Chimy matter, discussed below, as a secretary working on respondent's behalf, Monatas was specifically authorized to relay information and instructions from respondent to clients. Under these circumstances, Monatas's statements to Campos, particularly her statement informing Campos that respondent wanted Campos to fill out a form, were admissible to prove that Campos had retained respondent.

We also conclude that the evidence clearly and convincingly establishes respondent's intentional, reckless, or repeated failure to perform legal services competently, in that Campos testified respondent never filed any immigration documents for her husband or even provided Campos with completed documents for her to file. Moreover, although Campos sent a letter to respondent dated November 15, 1994, in which she requested a refund of all money previously paid to him, she never received any of her money back. Such evidence establishes that respondent is culpable of failing to refund the unearned fee of $750 and failing to promptly deliver to Campos the $75 she gave to respondent as a filing fee. Thus, we adopt the hearing judge's conclusions in counts nine, ten, and eleven.

The Van Tatenhove Matter

Sometime prior to October 1993, Dirk Van Tatenhove, a probate attorney, obtained the name of Virginia Russell, an educational consultant associated with respondent's law office, to help him seek special educational services for his daughter. Van Tatenhove contacted Russell in

October 1993 and discussed the matter with her. She thought that she could help Van Tatenhove and recommended that Van Tatenhove retain respondent as his attorney. Subsequently, Van Tatenhove received from Russell a letter dated October 20, 1993, which in part memorialized his conversation with her, and a proposed retainer agreement between respondent and Van Tatenhove. The agreement provided as relevant that Van Tatenhove would pay a nonrefundable retainer fee of $1,000 to respondent, which would cover "all legal services (excluding costs) . . . through the completion of one due process (max. of three days, if more than three days, the fee is $250.00 per additional day beyond three days) at which time a new contract must be negotiated if this office is to be continued to be retained." (*Sic*.) The agreement additionally provided that if the case were settled "without [attorney] fees as [agreed] upon by Attorney, then Client shall pay Attorney for all hours worked at $150.00 per hour[,] $75 per hour for all paralegal work" and that costs, including those for consultants, would be paid by respondent and then billed to Van Tatenhove after obtaining Van Tatenhove's consent. Van Tatenhove testified that he believed the retainer fee would be refundable if respondent did not perform services for him: "[A]s a practicing attorney I know that no retainer is non-refundable if the attorney doesn't substantially perform the work."[9] On or about November 4, 1993, Van Tatenhove sent a letter to Russell along with a check for $1,000 made out to respondent. He signed and sent her the retainer agreement on November 18, 1993.

[9]As will be discussed post, rule 3-700(D)(2) as interpreted does recognize that true retainer fees are nonrefundable. The retainer fee here is not such a true retainer.

On or about December 10, 1993, an evaluation was performed by Van Tatenhove's daughter's school which indicated that the daughter might not qualify for any special education services. At Russell's suggestion, Van Tatenhove contacted a psychologist to review his daughter's records and the school's evaluation. The psychologist conducted the evaluation free of charge and, on February 18, 1994, told Van Tatenhove that he could not win a case against the school to have Van Tatenhove's daughter placed in a special school. Respondent did not assist Van Tatenhove during either the school's or the psychologist's evaluation of the matter.

Shortly after meeting with the psychologist, Van Tatenhove discussed the matter with Russell, who agreed with the psychologist's evaluation. On March 24, 1994, Van Tatenhove sent a letter to respondent requesting an accounting and a refund of either the full retainer paid or the amount which had not yet been earned. Receiving no response, on May 3 and 17, 1994, Van Tatenhove sent two additional letters to respondent by certified mail, return receipt requested. Van Tatenhove received a telephone message on May 20, 1994, indicating that respondent's office had called to inform Van Tatenhove that respondent was out of town on vacation until May 30, 1994, and would prepare a bill when he returned. Van Tatenhove never received any other communication from respondent or his office and sent a complaint to the State Bar on September 1, 1994.

In 1996, Van Tatenhove finally received a letter, a statement, and a trust account check dated October 19, 1996, for $202 from respondent. The statement indicated that respondent had spent a total of 5.25 hours working on Van Tatenhove's case, which fact Van Tatenhove disputed. Although respondent indicated on the statement that he had spent two hours reviewing

the records of Van Tatenhove's daughter, Van Tatenhove sent records to Russell only, and Russell testified she never forwarded such records to respondent. In addition, contrary to the indication on the statement, Russell never had any telephone conversations with respondent regarding Van Tatenhove's daughter that lasted three quarters of an hour. Moreover, although the statement indicated that two hours was being billed for Russell's work as a paralegal at a rate of $75 per hour, in a letter of March or April 1994, Russell informed respondent she had worked 10 hours on this matter, and respondent owed her $80 for this work plus $20 for telephone bills, which amount respondent never paid. Russell also suggested in the letter to respondent that, because they could not help Van Tatenhove, he should refund the full retainer minus the actual cost to respondent of Russell's work and costs for telephone bills. Finally, the Van Tatenhove statement itself was not dated and did not reflect the dates on which the work was performed.

As to this matter, respondent was charged with violating rule 3-700(D)(2) (failing to refund promptly unearned fee after employment terminated – count twelve), rule 4-100(B)(3) (failing to maintain complete records of all client funds in member's possession and to render appropriate accounting – count thirteen) and section 6068, subdivision (m) (failing to respond promptly to reasonable status inquiries – count fourteen.)

Respondent does not challenge the culpability findings as to counts thirteen and fourteen. Based upon our independent review of the record, we adopt the hearing judge's findings of culpability as to these counts, as the evidence establishes that notwithstanding Van Tatenhove's letters, respondent failed both to respond promptly to Van Tatenhove's status inquiries and to render the requested accounting regarding the funds paid by Van Tatenhove.

Respondent asserts that count twelve should be dismissed because there was no clear and convincing evidence respondent did not earn the $1,000 fee paid by Van Tatenhove. Respondent first appears to argue that the $1,000 fee was a nonrefundable retainer to which rule 3-700 (D)(2) does not apply. He then argues that, even assuming the $1,000 was not a true retainer, the evidence establishes that he fully earned the fee.

Rule 3-700(D)(2) provides that an attorney whose employment has terminated must "[p]romptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the [attorney] for the matter."

We first note that there was no evidence in the record the fee agreement was ever signed by respondent. Since that agreement itself provides that the agreement is effective "when it is executed by the second of the parties to do so," it appears the agreement was never in effect.

Even assuming the agreement may be given effect, the State Bar asserts that, under the fee agreement, the $1,000 fee was not a true retainer, but an advanced fee for services to be rendered. The State Bar argues that its position is supported by the fee agreement itself, since the agreement establishes that the $1,000 was paid not to ensure respondent's availability for this matter or for a given period of time, but rather to pay respondent in advance for his services in conducting a due process hearing regarding special educational services for Van Tatenhove's daughter. We agree with the State Bar's argument.

In *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, we concluded on similar facts that the fee at issue constituted an advanced fee rather than a true

retainer fee. There, Lais and his clients entered into a written agreement providing for " 'a fixed, non-refundable retaining fee of $2,750.00 and a sum equal to $275.00 per hour after the first 10 hours of work. This fixed, non-refundable retaining fee is paid to [respondent] for the purpose of assuring the availability of [respondent] in this matter.' " (*Id*. at p. 920.) A few days after the agreement was executed, the clients left Lais a message indicating they had changed their minds about pursuing legal action, they wanted no work to be performed on the matter, and they wanted a refund of the money paid. Lais did not refund their money until after the clients had, among a number of things, filed a complaint with the State Bar. (*Id*. at pp. 920-921.) Although the hearing judge in that matter concluded, based on the language contained in the agreement, that the fee was a nonrefundable retainer, we determined that the characterization of the fee in the agreement was not determinative and held that the $2,750 was an advanced fee. (*Id*. at pp. 922-923.) We noted that a true retainer is money a client pays to secure an attorney's availability over a given period of time and concluded that such definition did not apply to the $2,750 paid by Lais's clients: "The $2,750 was not earned when paid, but was intended to cover the initial 10 hours of [Lais's] work." (*Id*. at p. 923.)

Likewise, in *Matthew v. State Bar* (1989) 49 Cal.3d 784, 789 the Supreme Court determined that Matthew failed to return an unearned fee of $1,000 in a client matter where Matthew had failed to perform the services for which he was retained notwithstanding that the fee agreement provided that the $1,000 was a nonrefundable retainer.

Similarly, we conclude that respondent's fee agreement with Van Tatenhove establishes that the $1,000 fee was not earned when paid, but was instead an advanced fee intended to cover

respondent's representation "through the completion of one due process [hearing]" lasting no more than three days.

In addition, when respondent eventually refunded a portion of the $1,000 to Van Tatenhove, he did so with a check drawn upon a client trust account. Therefore, assuming respondent's use of the trust account was proper, we may infer that respondent himself recognized that he did not earn the $1,000 when paid.

Moreover, as previously indicated, the fee agreement further provides that upon settlement of the case "without [attorney] fees as [agreed] upon by Attorney," Van Tatenhove was to pay respondent $150 per hour for the actual amount of time respondent spent on the case and $75 per hour for time spent by paralegals. While this provision of the fee agreement is not entirely clear, respondent, in his brief on review, indicates that this provision was to apply if the matter settled without a hearing. Because the matter was in fact concluded without a hearing, it appears that, if the agreement is given effect, this provision, rather than the provision regarding a nonrefundable retainer, is applicable here.

In arguing that the evidence established that he fully earned the $1,000 paid by Van Tatenhove, respondent focuses upon Russell's testimony that she worked for approximately 10 hours on the matter and incurred telephone costs of $20; her testimony that her standard rate as an educational advocate is $75 to $125 per hour; the fee agreement's provision calling for Van Tatenhove to be billed $75 per hour for paralegal services; Russell's testimony that she spoke with respondent about this matter; and respondent's bill for two and a half hours for research and two hours for telephone conversations with Russell regarding this matter. Respondent argues that

in view of the hearing judge's finding that Russell spent 10 hours on this matter, the judge should have found that respondent was entitled to bill Van Tatenhove for $750 for Russell's work, plus $20 for Russell's telephone costs. In addition, because respondent's bill showed that he spent two and a half hours for research and 45 minutes discussing the matter with Russell, the evidence established that respondent fully earned the entire amount paid.

As the State Bar points out, however, nothing in the record establishes that Van Tatenhove agreed to pay respondent for Russell's services at the paralegal rate set forth in the agreement. Instead, as previously indicated, the agreement provides that costs for consultants would be paid by respondent and then billed to Van Tatenhove if Van Tatenhove consented to the use of a consultant. Because Russell testified that respondent incurred only $100 in costs due to her consulting services, respondent would have been entitled to bill Van Tatenhove for that amount at most. However, in view of respondent's failure to pay Russell any amount for her consulting services in this matter, respondent was not entitled to bill Van Tatenhove for any consulting services.

In view of the evidence that respondent could not have reviewed the school records because he never received them and did not have telephone conversations with Russell regarding this matter which lasted three quarters of an hour, we adopt the hearing judge's finding that respondent fabricated those portions of his bill reflecting such work. We also adopt the hearing judge's finding that respondent's bill by itself establishes that respondent spent 2.5 hours for

research on this matter.[10] In view of such limited evidence of respondent's work, the evidence establishes that respondent did not earn the $1,000 paid by Van Tatenhove.

Moreover, in view of our determination that respondent could not charge Van Tatenhove for Russell's consulting work, even if respondent's bill accurately set forth respondent's work in this matter, and whether respondent was entitled to charge $150 for his own work as set forth in the agreement or $110 as set forth in the bill, respondent did not perform sufficient work to earn $1,000, yet he failed to refund any amount to Van Tatenhove for over two years after Van Tatenhove requested a refund. We therefore hold that respondent is culpable of failing to promptly return the unearned fee as charged in count twelve.

The Hammill Matter

Respondent obtained numerous cases from attorney Jeffrey Jensen when Jensen ceased to practice law. One of these cases was *Marco A. Jimenez v. Tony Roma's* (the *Jimenez* case), a workers' compensation case. Jensen had represented Marco Jimenez in the matter.

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[10]The State Bar asserts in a footnote of its responsive brief on review that the context of the hearing judge's finding in this respect indicates that the hearing judge intended to state that he did *not* find the bill to be sufficient evidence to establish that respondent spent 2.5 hours on research in this client matter. However, the structure of the sentence itself demonstrates that the decision accurately sets forth the hearing judge's finding, since the sentence contains two indicators of such finding: "The Court, however, *does find* this bill, by itself, sufficient evidence to establish that Respondent *did spend* 2.5 hours on medical/legal research . . . ." We interpret the hearing judge's footnote, which states that respondent may have harmed himself on this issue by failing to testify, to mean that the hearing judge might have been able to find that respondent spent additional time on the Van Tatenhove case had respondent been willing to testify regarding such matters.

Jeff Hammill is a civil litigation attorney whose practice consists mainly of workers' compensation cases. In 1994, Hammill was employed at the law firm of Ibold & Anderson, which firm represented Truck Insurance Exchange, a party in the *Jimenez* case. On or about April 21, 1994, Hammill received a letter from respondent. In the letter, respondent notified Hammill that he had taken over Jensen's practice and the majority of Jensen's workers' compensation cases and that, according to Jensen's records, Jensen was owed deposition fees in the amount of $1,012.50 for the *Jimenez* case. Respondent requested payment of the fees under Labor Code section 5710.

Hammill also received a copy of a letter dated October 12, 1994, from respondent to Cindy Pearson at Truck Insurance Exchange.[11] That letter informed Pearson that respondent had taken over Jensen's practice and requested payment for deposition fees in the amount of $1,012.50 for the *Jimenez* case. The letter also enclosed a copy of a lien filed by Jensen's office and stated that, if no response was received within 15 days, respondent would seek penalties and interest on the fees.

On October 27, 1994, Hammill sent a letter to respondent indicating, among other things, that Hammill's office represented Truck Insurance Exchange; had previously informed respondent of this representation in a telephone conversation between respondent and Michael Douglas of Ibold & Anderson on June 9, 1994, and a telephone conversation between respondent

[11]Because the letters from respondent to Pearson do not indicate that respondent also mailed copies directly to Hammill, it appears that Pearson or another employee at Truck Insurance Exchange forwarded respondent's letters to Hammill. The record does not reveal the position Pearson held at Truck Insurance Exchange.

and Hammill on April 25, 1994; and had previously informed respondent that the *Jimenez* case had already been resolved in a compromise and release agreement. The letter additionally instructed respondent to refrain from directly contacting Truck Insurance Exchange and warned that, if such direct contact occurred again, Hammill's office would "take up this issue with the State Bar of California." Hammill did not receive a response to this letter.

On or about February 3, 1995, Hammill received a copy of another letter from respondent to Pearson at Truck Insurance Exchange. In this letter, dated January 19, 1995, respondent again requested payment of $1,012.50 in deposition fees, indicated this was his "final request for these fees," and stated he would petition the court for such fees as well as penalties and interest if Pearson did not respond within 15 days.

At some point, Hammill sent a letter to the State Bar. On February 14, 1995, respondent sent a letter to the State Bar responding to Hammill's letter and explaining the contact his office had with Hammill's client. Respondent indicated that he was a solo practitioner with hundreds of cases and therefore extremely busy. Because of this, he relied on his staff "to handle a large portion of the correspondence regarding various cases. I have complete confidence in my staff, and because of this I allow them to work independently and put my name to letters and other documents, after I have briefed them on how to legally handle various situations." Respondent explained that a nonattorney member of his staff, Damon Pipitone, was in charge of working on the *Jimenez* case and was "simply writing letters 'to opposition' as per my instructions, unaware that he was doing anything wrong." Respondent admitted that the letters were sent from his office and accepted responsibility, but stated that he did not personally write or sign them. He

also indicated he had explained to his staff the nature of the violation so as to avoid the situation in the future.

Respondent was charged in this matter (count fifteen) with failing to supervise his employee adequately, thereby intentionally, recklessly, or repeatedly failing to perform legal services with competence in violation of rule 3-110(A). Respondent asserts that this count should be dismissed because, as to this matter, there is no evidence of a violation of any of the Rules of Professional Conduct. More specifically, respondent argues that a violation of rule 3-110(A) cannot be predicated upon improper contact, through an employee, with a party represented by counsel and that, in any event, there was no contact with a represented "party" as that term is defined in rule 2-100(B).

We first address respondent's argument that there was no evidence of contact with a represented party. Rule 2-100(A) provides that an attorney shall not communicate, either directly or indirectly, about the subject of the representation with a party whom the attorney knows to be represented by another attorney, unless the other attorney consents. Rule 2-100(B) states: "For purposes of this rule, a 'party' includes: [¶] (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or [¶] (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

Respondent argues that there is no evidence in the record regarding the position held by Pearson within the corporation and that therefore there is no evidence that respondent's office sent letters to a "party." We disagree. Here, Hammill notified respondent in the letter of October 27, 1994, that by sending the October 12, 1994 letter to Pearson, respondent had contacted a represented party. The only reasonable inference from this evidence is that either Pearson held one of the positions listed in rule 2-100(B)(1) or Pearson's statements or actions pertaining to the matter would be binding upon, imputed to, or constitute an admission on the part of the corporation. We note additionally that instead of disputing any assertion that Pipitone's conduct was an improper contact with a represented party, respondent appeared to concede the issue in his letter to the State Bar dated February 14, 1995. There, in seeking to explain this matter, respondent described his office's contact with Pearson as an "honest mistake" made by a nonattorney who was unfamiliar with rule 2-100 and was "unaware that he was doing anything wrong." Respondent further stated that he subsequently "explained to [his staff] the nature of the violation" and that he accepted "full responsibility for the . . . violation."[12]

As there is no contrary evidence in the record regarding the propriety of the letters to Pearson, we conclude that Pipitone's letters to Pearson constituted a contact with a represented party. Moreover, because respondent's office was notified of this fact in Hammill's letter of

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[12]Notwithstanding respondent's statements in the letter to the State Bar that the contact was an honest mistake, as we noted in *In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70, 81, rule 2-100 and its predecessor rules are therapeutic and "designed, in part, to shield the represented party from well-meaning, but misguided advances by an attorney to an adverse party as well as deliberately improper ones. [Citations.]" The rules are also designed to protect the opposing party's counsel and the opposing party's relationship with his or her counsel. (*Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 139.)

October 27, 1994, at the very least Pipitone's second letter to Pearson, dated January 19, 1995, was improper.

Since respondent was not charged with a violation of rule 2-100, we need not decide whether respondent violated that rule through his employee's contact with Pearson. The State Bar instead relies upon the factual allegations regarding this contact only to support the rule 3-110(A) violation. Accordingly, we consider such allegations only for that purpose.

Based upon the allegations of the improper contact by respondent's office with a represented party, respondent was charged with failing adequately to supervise his staff, thereby intentionally, recklessly, or repeatedly failing to perform legal services competently in violation of rule 3-110(A). As indicated, respondent argues that any improper contact by his employee cannot result in his own culpability for intentionally, recklessly, or repeatedly failing to perform services competently.

"[W]here an attorney has been alerted to problems and does not adequately address them, then such gross neglect may be disciplinable as a failure to perform services competently." (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 682.) Here, respondent admitted in his letter to the State Bar that he runs a high volume law office, relies upon his staff to work on cases independently, and allows staff to sign his name to letters and other documents, apparently without reviewing such documents himself. Respondent also appeared to admit that Pipitone was in charge of working on this case with no supervision whatsoever other than respondent's initial instructions. Even after the first letter was sent to Pearson and respondent had been cautioned by opposing counsel to send all such letters directly to counsel, respondent still

took no action whatsoever. In other words, respondent was alerted to a problem, yet apparently took no action to correct the problem, resulting in Pipitone sending another letter directly to Pearson.

Although in his letter to the State Bar, respondent indicated that he had no knowledge that his employee was doing anything wrong, we note that a lack of actual knowledge is not a defense to the charge of recklessly or repeatedly failing to perform legal services with competence where it appears there is no system in place for supervising employees and monitoring cases. (*In the Matter of Sullivan*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 611-612.) While an attorney cannot be held responsible for every event which takes place in his or her office, he or she does have a duty to reasonably supervise staff, both by taking steps to guide employees and by reviewing client files to determine whether staff work has been appropriate. (*In the Matter of Hindin*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 681-682.) Respondent's failure to guide his staff and review their work constitutes a failure to adequately supervise staff, and we therefore conclude that respondent was culpable of the charge set forth in count fifteen.[13]

[13]The State Bar asserts that the evidence presented in this count establishes that respondent also aided in the unauthorized practice of law by allowing Pipitone to handle an entire matter. However, because the State Bar presented no evidence that Pipitone engaged in acts which only an attorney may perform, we conclude that there was no clear and convincing evidence of such additional misconduct.

The Chimy Matter

Emanuel Jesus Chimy had a workers' compensation claim against American Handle. Chimy, who did not speak or read English fluently,[14] initially hired Jensen as his attorney in the matter, but after Jensen ceased to be an attorney in good standing, Benjamin Ammeian took over the case in October or November 1994.

On January 24, 1995, respondent sent a letter to State Fund regarding Chimy's case against American Handle. In the letter, respondent stated he had substituted into the case in place of Jeffrey Jensen as the attorney of record. He also stated that Chimy was "willing to accept $4,500.00 to settle this case . . . ."

On or about February 14, 1995, Chimy received a letter from respondent dated February 6, 1995. When Chimy telephoned respondent's office to inquire about the letter, someone named Monica told him that respondent had Chimy's case and made an appointment for Chimy to come to the office on February 17, 1995.

At the February 17, 1995 meeting, Chimy was told that respondent was taking his case. Chimy indicated he was confused because Ammeian was his attorney and asked whether Ammeian knew about respondent taking the case. Respondent told him that Ammeian was not working on his case and that respondent had taken the case from Jeffrey Jensen. Respondent also told him that he had negotiated a settlement of $10,000 for Chimy and asked Chimy to sign some papers. Chimy signed a document to allow respondent to become his attorney and other

[14]During the proceedings in the hearing department, an interpreter translated during Chimy's testimony.

documents which were not explained to him. At some point prior to March 23, 1995, respondent substituted into the workers' compensation matter as attorney of record.

Approximately a week later, Chimy contacted Ammeian.

In March 1995, Ammeian received a letter from respondent dated March 14, 1995, in which respondent stated he was substituting in as attorney of record for Chimy in the workers' compensation case. Ammeian called State Compensation Insurance Fund and spoke with a woman named Trinidad Crystal. Based on his conversation with her, Ammeian called Chimy to clarify whether Chimy still wanted Ammeian to represent him. Ammeian set up an appointment with Chimy.

Ammeian met with Chimy on or about March 23, 1995. At that time, Chimy executed another substitution of attorney form substituting Ammeian into the matter as attorney of record in place of respondent. Ammeian sent this form to the State Compensation Insurance Fund. On March 23, 1995, respondent was dismissed as the attorney of record by the Workers' Compensation Board. Ammeian also sent a letter to respondent which, among other things, requested respondent's file on the Chimy workers' compensation matter. Ammeian never received the file from respondent. Ammeian subsequently settled the Chimy matter for $25,000.

In other cases Ammeian had received from Jeffrey Jensen's practice, respondent had also sent letters to insurance carriers and defense attorneys, notwithstanding that Ammeian had already notified respondent that these were Ammeian's clients.

As to this client matter, respondent was charged with violating rule 1-400(C) (soliciting a prospective client with whom attorney has no family or prior professional relationship – count

sixteen). Respondent asserts that the evidence establishes he was not culpable of violating this rule because he had a reasonable, good faith belief that he had a prior professional relationship with Chimy. This belief was based upon the facts that respondent took over most of Jeffrey Jensen's cases; that, notwithstanding respondent's request, Ammeian did not inform respondent that Ammeian had taken over Chimy's case; and that the files were in disarray, with documents frequently placed in the wrong files, causing confusion. Respondent argues that he therefore reasonably believed that Chimy was mistaken when Chimy told respondent that Ammeian was his attorney.[15]

The hearing judge found that respondent was not a credible witness with respect to this matter and concluded that respondent willfully violated rule 1-400(C) when he continued the meeting with Chimy after Chimy informed respondent that Ammeian was his attorney. We agree with this conclusion.

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[15]Respondent testified that he was not sure whether Ammeian was representing Chimy. He testified that he had earlier asked Ammeian to give him a list of all of the cases Ammeian had taken from Jeffrey Jensen, and Chimy's name was not on the list Ammeian submitted to respondent. He further testified that when he substituted into Chimy's case he believed that Chimy was not represented by an attorney.

Respondent explained that when the State Bar asked him to take over Jeffrey Jensen's cases, he was required to look over approximately 3,400 cases. He testified that the files were not organized, mail had not been answered for about a year and a half, and documents had been placed in the wrong files. Respondent stated that he dismissed approximately 1,000 of the cases and took another 1,400 to 1,700. He further stated that Ammeian took about 40 cases and another firm, Leva & Knight, took 200 to 300. Respondent testified that when he discovered he was receiving mail or had documents pertaining to clients from the Jensen practice which had been assigned to other law offices, he routinely sent the documents or mail to the other offices.

Respondent testified he was aware that approximately one month after he had been substituted in as attorney of record in the case, he was dismissed as the attorney of record, and the compromise and release on which he had obtained Chimy's signature was eventually revoked.

While respondent deserves credit for attempting to preserve Chimy's workers' compensation claim after Jensen became ineligible to practice law, respondent does not automatically own a cause of action or a client as a result of taking over Jensen's cases. As we observed above in the Brown matter, the client has an absolute right to retain counsel of choice. In *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635, we found a violation of former rule 2-101, regarding improper solicitation of potential clients, where the attorneys, working through others, imposed their services on clients. We there noted that the danger of solicitation is that lawyers, trained in persuasion, may attempt to use such skills on potential clients who are vulnerable and susceptible to manipulation. (*Id*. at p. 652.) The record here demonstrates that a concern about that danger is justified, as respondent used his skills of persuasion to convince a confused, non-English-speaking worker to substitute respondent as his attorney of record, notwithstanding that Chimy stated that he was already represented by a practicing attorney.

Even if respondent was not aware that Chimy was represented by Ammeian when respondent's office asked Chimy to come in for a meeting, Chimy's statement that Ammeian was his attorney was sufficient to put respondent on notice that Ammeian was handling this matter. This is especially true in view of respondent's previous recognition that Ammeian's list of clients from Jeffrey Jensen's practice was incomplete. We note that the Rules of Professional Conduct serve to prevent not only deliberate overreaching by attorneys, but also inadvertent yet improper conduct. (Cf. *In the Matter of Wyshak*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 81.)

Moreover, respondent's letter of March 14, 1995, informing Ammeian that Chimy had retained respondent and asking Ammeian to sign an enclosed substitution of attorney form, establishes that respondent knew that Ammeian had been working on the matter. We therefore conclude that the evidence clearly and convincingly establishes that respondent solicited a prospective client with whom he had no prior professional relationship in violation of rule 1-400(C).

The Garcia Matter

In this client matter, respondent was charged in counts seventeen and eighteen with violating rule 3-110(A) based upon his intentional, reckless, or repeated failure to perform legal services with competence and his failure to supervise his employees adequately. It appears from the record that count seventeen, which alleged respondent's failure to appear at a mandatory settlement conference on April 4, 1995, was dismissed upon motion of the State Bar at a pretrial conference. In addition, count eighteen, which alleged that respondent's office caused the wrong client to execute a settlement document intended for another client, was dismissed by the hearing judge based on a lack of clear and convincing evidence that the problem was caused by respondent's failure to supervise his employees. The State Bar does not seek review of these dismissals. Upon our independent review, we agree with and adopt the dismissal of these counts and clarify that such dismissals are with prejudice.[16]

[16]See Rules of Procedure of the State Bar, rule 261(a).

The Vielma/Herrera Matter[17]

Respondent was charged in count nineteen with intentionally, recklessly, or repeatedly failing to perform legal services competently in violation of rule 3-110(A) based upon his failure to appear on behalf of his clients on March 10 and June 19, 1995. After considering the exhibits, the hearing judge found there was no clear and convincing evidence of this violation. Upon our independent review of the record, we agree, as there is no evidence that respondent had notice of the dates of the court appearances. We therefore adopt the hearing judge's dismissal of count nineteen and clarify that such dismissal is with prejudice.

MITIGATION AND AGGRAVATION

Mitigation

In mitigation, respondent presented evidence that he performed pro bono work in several education cases. Although he testified he could have been awarded attorney fees by the courts had he won in these matters, such fees are rarely awarded in these types of cases, and in fact he performed services in these cases without ultimately receiving compensation. Although he did not have written retainer agreements in all of these cases stating that the clients did not have to

[17]Neither the reporter's transcript of the proceedings in the hearing department nor the clerk's notations on the exhibits themselves indicate that the exhibits pertaining to this client matter were formally admitted into evidence. However, as it appears that the hearing judge considered the exhibits and the judge and counsel treated the exhibits as admitted into evidence, we treat the exhibits are part of the record for purposes of review. (*Komas v. Future Systems, Inc.* (1977) 71 Cal.App.3d 809, 812.)

pay anything for respondent's representation, he did have such a retainer in the Cronkite case. However, he had not brought that agreement with him to the trial in this proceeding.

In addition to the foregoing, respondent worked on a panel with the Los Angeles County Bar Association's Modest Means Section for approximately one and a half years. While on this panel, respondent represented 10 to 15 clients at the rate of $40 per hour.

Respondent also presented evidence that he performed other legal work at a reduced rate of $70 per hour, regularly handles civil rights cases, and has handled disabled veterans cases, for which he could have received fees if awarded by the court.

While respondent's representation in some cases for reduced or no fees constitutes evidence in mitigation (cf. *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521), as the hearing judge found, respondent's testimony lacked credibility, and the evidence established that respondent was eligible to receive substantial attorney fees in many of the cases respondent described in presenting evidence in mitigation. It is therefore unclear whether respondent's motive for taking such cases was to help others or to collect attorney fees, and under these circumstances, we give respondent's evidence little weight in mitigation, as did the hearing judge.

Aggravation

Respondent challenges many of the hearing judge's findings regarding circumstances in aggravation.

In aggravation, respondent engaged in multiple acts of wrongdoing. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b)(ii).)

In addition, respondent's conduct was followed by or surrounded by dishonesty, concealment, overreaching, and other violations of the Rules of Professional Conduct or the State Bar Act. (Std. 1.2(b)(iii).) Specifically, respondent's bill to Van Tatenhove was a dishonest attempt by respondent to claim he had earned the $1,000 fee and thereby avoid culpability for failing to return unearned fees. Such conduct also constitutes an act of moral turpitude in violation of section 6106. Although respondent challenges this finding in aggravation, in view of the evidence that respondent could not reasonably have believed he performed some of the work set forth on the bill, e.g., reviewing school records, we adopt the hearing judge's finding that the bill as a whole was not a reasonable statement of respondent's work, but a fraudulent attempt to justify keeping most of Van Tatenhove's fee.

In addition, respondent's conduct in the Brown matter was surrounded by overreaching. First, after receiving Baker's letter of April 18, 1994, informing respondent that the Browns had hired Baker to handle the matter, respondent filed a complaint on behalf of the Browns on April 28, 1994. Such conduct constitutes a violation of section 6104. Second, respondent attempted to settle the matter notwithstanding that Brown never agreed to a settlement proposed by respondent.

Respondent argues that he was justified in filing the complaint in view of the lack of indication from the Browns that they had hired new counsel and the legitimate concern, shared

by Baker, that the statute of limitations would run sometime between April and June1994.[18] However, respondent never explained why he did not simply inform new counsel of the possible statute of limitations issue and request immediate verification that the Browns had hired new counsel in view of the need to file a complaint quickly, rather than file a complaint for the Browns notwithstanding notification that they no longer wished to employ him. Nor did respondent explain why he did not promptly notify the Browns and Baker in April 1994 that he had filed the complaint to protect the Browns and make provisions to transfer the file to Baker. Under these circumstances, the findings of overreaching and a violation of section 6104 are justified. Moreover, although respondent asserts that the hearing judge's finding that respondent filed the complaint to protect his attorney fees is pure speculation, it appears that this finding was not an additional factor in aggravation, but merely a partial explanation for the hearing judge's rejection of respondent's testimony regarding his reasons for filing the complaint. We need not, and do not, adopt such finding, but we do give great weight to the hearing judge's finding that respondent's explanation for filing the complaint lacks credibility.

Respondent also argues he testified without contradiction that the Browns had orally agreed to the structured settlement, but subsequently decided not to sign the settlement documents. However, the record shows Baker testified without objection that the Browns told

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[18]Respondent testified he had filed a medical malpractice complaint on behalf of Tamekia on April 28, 1994, because the insurance company for the medical provider took the position that the statute of limitations would run in that month, one year after Tamekia was injured as a result of the alleged malpractice. Respondent testified he filed the complaint to avoid "unnecessary" litigation regarding the statute of limitations issue notwithstanding that he believed the statute of limitations on the claim was tolled while Tamekia was a minor. (See Code Civ. Proc., § 340.5.) He further testified he believed there was "no harm in me filing it to protect . . . the situation."

him they did not want to accept the settlement figure which respondent had negotiated. Moreover, we give great weight to the hearing judge's finding that respondent's testimony on this issue lacked credibility and therefore adopt the hearing judge's finding in this regard.

Respondent challenges many of the hearing judge's findings of uncharged misconduct, asserting that these violations should not be considered in any way in these proceedings due to the State Bar's failure to charge them in the notice of disciplinary charges (NDC). Respondent relies on *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163 and *In the Matter of Dixon*, *supra*, 4 Cal. State Bar Ct. Rptr. 23.

Glasser, however, did not address when or whether evidence of uncharged misconduct presented at trial may properly be considered in aggravation. Rather, the only issue there was whether the hearing judge correctly dismissed the notice to show cause on the motion of Glasser, which motion was based on the State Bar's failure to allege with particularity what misconduct was charged. *Glasser* is applicable here only to the extent that it acknowledged an attorney's entitlement in disciplinary proceedings to reasonable notice of the specific misconduct to be proved at the disciplinary hearing. (*In the Matter of Glasser*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 171.)

Dixon recognized the holding of *Edwards v. State Bar* (1990) 52 Cal.3d 28, 36, that evidence of uncharged misconduct may sometimes be considered in aggravation in disciplinary proceedings: "Because this evidence was elicited for the relevant purpose of inquiring into the cause of the charged misconduct, because the evidence was used merely to establish a circumstance in aggravation, and not as an independent ground of discipline, and because the

review department's conclusion was based on [Edwards's] own testimony, we find no violation of [Edwards's] right to notice of the charges against him." (*Edwards v. State Bar*, *supra*, 52 Cal.3d at p. 36.) In *Dixon*, however, the evidence of uncharged misconduct was introduced "to show an independent ethical violation and not merely for the purpose of inquiring into the charged misconduct." (*In the Matter of Dixon*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 41.) Although we stated in *Dixon* that, under such circumstances, the better practice would have been to file a separate charge for the misconduct, we nevertheless held that, because there was no objection to the testimony or documentary evidence establishing the uncharged misconduct, the evidence could properly be considered in aggravation: "We conclude that absent an appropriate objection to the introduction of evidence of misconduct other than that charged, such evidence may, when appropriate, be used as an aggravating factor in disciplinary matters. [Citation.]" (*Ibid*.)

Here, the hearing judge found as circumstances in aggravation several uncharged acts of misconduct. The hearing judge found that, in the Benjamin matter, respondent willfully failed to return client telephone calls in violation of section 6068, subdivision (m).[19] The hearing judge additionally found that respondent overreached in the Chimy matter in attempting to settle the

[19]Respondent also briefly disputes the hearing judge's conclusion that the evidence supports a finding of failure to return client telephone calls. We conclude, however, that the evidence fully supports the finding in view of Benjamin's testimony that she left over twenty messages on respondent's office answering machine over a period of approximately six to seven weeks, but received no response.

matter unbeknownst to the client and before the client even knew of respondent.[20] The hearing judge also found in the Chimy matter that, in attempting to settle the matter, respondent made misrepresentations to the insurance company in violation of section 6106 and that respondent failed to provide Chimy's file to Ammeian upon request in violation of rule 3-700(D)(1). In the Van Tatenhove matter, the hearing judge found that respondent violated rule 1-320(A) by splitting fees with Russell, who is not an attorney.

Of the foregoing evidence of uncharged misconduct, respondent objected on the specific ground urged here only to the evidence regarding the violation of rule 3-700(D)(1) in the Chimy matter. As to this evidence, respondent timely objected that it was beyond the scope of the solicitation charge set forth in the NDC. The hearing judge should have sustained this objection absent a motion by the State Bar to amend the NDC in a way that would have given respondent a sufficient opportunity to defend. (See *In re Ruffalo* (1968) 390 U.S. 544, 550-552.) In view of respondent's timely objection, we decline to adopt the finding in aggravation that respondent violated rule 3-700(D)(1) in the Chimy matter.

As to the finding that respondent was splitting fees with a nonlawyer in the Van Tatenhove matter, respondent argues that there was no evidence he actually split fees with Russell, only evidence that he entered into an agreement to do so. However, as the State Bar points out, Russell testified she was associated with respondent's office as an educational consultant and worked on approximately 20 cases with respondent. Under her agreement with

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[20]Although respondent again argues that he reasonably believed Chimy was his client, we reject such argument for the reasons set forth previously.

respondent, she was to receive 15 percent of all retainers and settlements plus eight dollars per hour. She did not testify that she was never paid for her work on these other 20 matters, and the clear inference is therefore that she was paid according to their agreement. Because such circumstantial evidence is sufficient to support the hearing judge's finding of this factor in aggravation (*Medoff v. State Bar* (1969) 71 Cal.2d 535, 550-551), we adopt such finding.

We also adopt the hearing judge's finding that, with respect to his clients Benjamin, Campos, and Van Tatenhove, respondent demonstrated indifference toward atonement for or rectification of the consequences of his misconduct. (Std. 1.2(b)(v).) We reject respondent's assertions that this finding should be dismissed with respect to Benjamin and Campos.[21]

The evidence showed that respondent refused to refund Benjamin's money when she terminated respondent's services, although she had received no apparent benefit, and respondent told Benjamin she would have to take him to small claims court. After Benjamin received an arbitration award for a refund of the money paid to respondent, she tried to contact respondent again, but respondent hung up on her. Subsequently, respondent delayed over three years in satisfying the award. This evidence amply supports the hearing judge's finding in this respect.

Similarly, when Campos called respondent and told him that she wanted her money back because he had not done anything for her and that she was going to send a letter to the State Bar due to his failure to perform the services for which he was retained, he treated her statement "like

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[21]Respondent does not challenge the finding that he demonstrated indifference toward atonement for or rectification of the consequences of his misconduct in the Van Tatenhove matter, and based upon his failure to respond to Van Tatehhove's letters and subsequent dishonest billing statement, we adopt the finding.

a joke" and hung up on her. Notwithstanding respondent's arguments that he did not know Campos and was confused as to what she was talking about, we agree with the State Bar that given the nature of respondent's business relationship with Orozco, respondent should have been especially sensitive to the needs of clients from the Santa Ana office. We conclude that the evidence supports a finding that respondent showed indifference toward atonement for or rectification of the consequences of his misconduct. While respondent asserts Campos should not have been allowed to testify regarding respondent's state of mind, we agree with the State Bar that Campos's testimony was merely a description of respondent's demeanor rather than speculation regarding respondent's state of mind.

The hearing judge also found that respondent displayed a lack of cooperation with the State Bar and engaged in misconduct during these disciplinary proceedings, which the hearing judge found to be aggravating under standard 1.2(b)(vi). More specifically, the hearing judge found that respondent (1) attempted to delay or prevent the State Bar Court proceedings by improperly asserting various statutory and constitutional privileges, including his Fifth Amendment privilege against self-incrimination, and repeatedly asking to be found in contempt; (2) displayed disrespect to the State Bar by making unfounded and inflammatory statements in various pleadings filed in this matter;[22] (3) made a dishonest statement in his pretrial statement; (4) filed motions containing baseless contentions and attempted to mislead the court in his

[22]The hearing judge also found that respondent failed to maintain the respect due judicial officers and the court, as proscribed by section 6068, subdivision (b).

arguments with respect to the Benjamin matter; and (5) made various additional misstatements throughout these proceedings.

We first address respondent's assertion of statutory and constitutional privileges to certain questions in the hearing department. When respondent was initially called as a witness for the State Bar in the Van Tatenhove matter, he refused to answer any questions, including a question about the date of his admission to the State Bar of California, invoking his Fifth Amendment right against self-incrimination, a right to privacy, an attorney-client privilege, and all state and federal constitutional and statutory privileges. Subsequently, respondent answered the question regarding his date of admission to the State Bar of California, but refused to respond to another question based upon his right against self-incrimination, refused to answer the hearing judge's inquiry regarding the application of the Fifth Amendment under the circumstances, and asked the court to find him in contempt so that he could appear before a state or federal judge. The hearing judge found that respondent's assertion of the privilege was improper and indicated he would consider imposing various sanctions on respondent as a result. Ultimately, respondent refused to answer almost every question posed to him in the Van Tatenhove and Orozco matters, and based upon his initial refusal to respond to the State Bar's questions in the Hammill matter, the State Bar did not rely upon his testimony in that matter.

On February 20, 1998, respondent filed a motion requesting to be found in contempt. In that motion, respondent stated that the hearing judge had imposed certain sanctions. The hearing judge clarified on the record that he had stated he would consider imposing the sanctions listed, but that he had not yet imposed them. Ultimately, the hearing judge sanctioned respondent for

asserting the various privileges by (1) sustaining many of the State Bar's objections during respondent's cross-examination of Russell on March 23, 1998, (2) waiving the requirement that the State Bar lay a foundation as to respondent's State Bar registration card, and (3) considering respondent's improper assertion of these privileges as an aggravating circumstance.

We adopt the hearing judge's finding in aggravation that respondent's assertion of constitutional and statutory privileges in response to the State Bar's questioning regarding respondent's State Bar registration card constituted a lack of cooperation and misconduct during the disciplinary proceedings. We also adopt a finding in aggravation that respondent's requests to be found in contempt constituted a lack of cooperation, as well as the apparent findings noted in footnotes in the decision that respondent improperly asserted constitutional and statutory privileges to other questions posed to him on direct examination. However, we give little weight to these findings in aggravation for the following reasons.

First, although we conclude that respondent's assertion of the various privileges was improper,[23] there is no evidence of excessive delay, notwithstanding that the proceedings were

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[23]In general, respondent had the right to invoke constitutional and statutory privileges in these disciplinary proceedings. (§§ 6068, subd. (i), 6085, subd. (e).) Respondent's briefs filed in the hearing department addressing the propriety of sanctions for the assertion of the privileges appeared to indicate that respondent relied primarily upon the Fifth Amendment privilege. However, in invoking this privilege, respondent was required to explain why the information sought by the State Bar was incriminating. (See *Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 429.) Because the acts and events regarding which respondent was asked to testify occurred several years prior to the trial in this case, respondent was required to specify why he believed a criminal prosecution for such acts was not barred by the statute of limitations (*id.* at pp. 428-429), particularly in view of the State Bar's assertion that the one-year limitations period applicable to misdemeanors had run (see Pen. Code, § 802, subd. (a)). While respondent asserted in the hearing department that he could conceivably be charged with conspiracy (Pen. Code, § 182) to commit a felony, for which a six-year limitation period provided for in Penal

prolonged somewhat due to respondent's assertion of the privileges in the Van Tatenhove and Orozco matters. Further, there was almost no delay due to respondent's refusal to respond to questions regarding his State Bar registration card. Although we recognized that "the improper invocation of the Fifth Amendment and the resulting refusal to testify may properly be considered an aggravating factor" in *In the Matter of Dixon*, *supra*, 4 Cal. State Bar Ct. Rptr. at pages 41-42, we note that here, unlike in *Dixon*, respondent willingly responded to most of the questions presented to him throughout the proceedings and only asserted the various privileges as to matters which he believed involved the possibility of prosecution for aiding the criminal offense of engaging in the unauthorized practice of law. (See § 6126.) In addition, we cannot say that the delay which did occur was caused solely by respondent, since it was the State Bar's decision to call respondent as its first witness in these matters rather than attempting to prove its case through other witnesses as it did in the Hammill matter, thereby avoiding the same delay. Moreover, there was no showing that respondent's refusal to answer questions interfered with the State Bar's ability to prove its case. Finally, although we recognize that the use of "specious and unsupported arguments in an attempt to evade culpability in a disciplinary matter" constitutes a factor in aggravation (*In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 225), we find no clear and convincing evidence that respondent asserted the privileges in

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Code section 800 could apply, he failed to specify what felony charge or charges he believed applied to his conduct such that a prosecuting agency could rely upon this lengthy limitations period. We therefore determine that respondent failed to establish that his assertion of the privilege against self-incrimination was proper. We find this to constitute an aggravating circumstance, but as noted herein, give it little weight, particularly since there was no clear and convincing evidence of respondent's bad faith or of delay prejudicial to the State Bar or the State Bar Court.

bad faith. (See *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 44.) Under these circumstances, respondent's improper assertion of various privileges is not entitled to great weight in aggravation.

We reject the hearing judge's finding in aggravation that respondent displayed a lack of cooperation and engaged in misconduct during these proceedings by making unfounded and inflammatory statements in various pleadings filed in this matter. The hearing judge found that respondent made unfounded and inflammatory statements in his Reply to Opposition to Motion to Recuse State Bar Court Judges filed on June 27, 1996; in his Verified Petition for Review and Request for Referral to a Constitutional Court filed on October 2, 1996; and in his Complaint for Deprivation of Civil Rights under Color of State Law, Injunctive and Declaratory Relief filed in the U.S. District Court on February 13, 1998. However, such statements are not proper subjects for aggravation absent a showing by the State Bar by clear and convincing evidence that they are false. (Cf. *In the Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775, 778, 783-785.) The State Bar made no such showing here.

Similarly, we reject the hearing judge's apparent findings in aggravation that respondent filed six petitions for interlocutory review with the review department, at least one petition for review with the California Supreme Court, and over 30 motions in the hearing department,[24] as there was no determination or showing by clear and convincing evidence that these documents were completely lacking in merit and were filed in bad faith. We are reluctant to find that such

[24]We note that it is unclear from the decision whether the hearing judge considered the motions filed by respondent to be a factor in aggravation.

filings, though numerous, are an aggravating circumstance absent an intent on respondent's part to mislead or hinder the court, since respondent acted as cocounsel during the hearing department proceedings (*In the Matter of Aguiluz*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 44) and is entitled to reasonable access to the courts to seek judicial remedies (*In the Matter of Salant* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 1, 8).

We adopt the hearing judge's finding in aggravation that respondent made a dishonest statement in his pretrial statement with respect to the Campos matter in view of respondent's assertion in his pretrial statement that Campos' fee was returned to her and testimony in the hearing department that Campos was never his client. Although respondent asserts that, as he testified, his assertion in the pretrial statement was a mistake rather than an intentional misstatement of the facts, the hearing judge implicitly rejected such testimony as lacking in credibility, and as previously indicated, we give such credibility findings great weight.

We reject the findings in aggravation that respondent filed motions containing baseless contentions and attempted to mislead the court in his arguments with respect to the Benjamin matter. The hearing judge based these findings upon (1) respondent's filing motions in which he reiterated his argument regarding Probate Code section 13660 notwithstanding that such argument had been rejected in an earlier ruling and (2) presenting argument that, pursuant to this Probate Code section, his fee in the Benjamin matter was authorized. However, asserting (or reasserting) a legally erroneous position does not necessarily rise to the level of asserting, in bad faith, a position

which is totally devoid of merit. We conclude there is no clear and convincing evidence that such motions and argument caused delay or that the motions were brought in bad faith.[25]

The final basis for the hearing judge's finding of lack of cooperation and misconduct during the disciplinary proceedings was that respondent made various additional misstatements throughout these proceedings.

We reject the hearing judge's finding that respondent made a misstatement in his May 20, 1998 Verified Petition for Interlocutory Review. There, respondent stated that, while testifying on that date, he asserted various constitutional and statutory privileges, and as a result, the hearing judge imposed various sanctions. As his decision indicates, the hearing judge "did not impose any sanctions with respect to the matter on which Respondent asserted certain privileges on March 23, 1998." However, the hearing judge did impose sanctions on that date as a result of respondent's earlier refusal to answer questions in the Van Tatenhove matter, sustaining many of the State Bar's objections to respondent's questions during cross-examination of Russell. We therefore conclude there is no clear and convincing evidence that respondent made this misstatement in bad faith rather than inadvertently.

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[25]Because of the lack of clear and convincing evidence of bad faith, this case is distinguishable from *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 115-118, in which we determined that Lais was culpable of misconduct for reasserting legal arguments before a superior court and an appellate court after the appellate court, in an earlier appeal in the same case, had explicitly ruled on the precise legal issue in the case. We there noted that the appellate court's second opinion, essentially determining that the second appeal lacked any merit due to the assertion of identical legal arguments subsequent to the first decision, "was, at the very least, a prima facie determination that [Lais's] appeal in that case was frivolous and that it was pursued in bad faith." (*Id*. at p. 118.)

We adopt the hearing judge's finding that respondent made a misstatement in the same document regarding being denied the ability to cross-examine Orozco, as the record reflects that the hearing judge specifically overruled the State Bar's objection to cross-examination based upon respondent's refusal to testify regarding the Orozco matter.

We reject the hearing judge's finding that respondent misstated, in his March 23, 1998 Motion for Recusal, that the hearing judge indicated he intended to sever the trial into two separate trials. Respondent's language does not clearly misstate the hearing judge's position that he was considering severing the trial.

We adopt the hearing judge's finding that, during a February 12, 1997 telephonic status conference, respondent misinformed a different hearing judge that he had filed an answer to the second amended NDC, then filed a Motion for Extension of Time to File Answer on February 27, 1997.

Finally, we adopt the hearing judge's finding that in his Motion to Put Oneself in Contempt filed on February 20, 1998, respondent misstated that the hearing judge imposed various sanctions for his assertion of various constitutional and statutory privileges on February 19, 1998. Contrary to respondent's statement, the hearing judge indicated on that date that he would consider certain sanctions, but the only sanction imposed was the waiver of the requirement that the State Bar lay a foundation as to respondent's State Bar registration card.

Respondent argues that he was never given notice that the hearing judge considered to be improper any language he used or statements he made at any time during the proceedings. However, respondent has provided no authority that such notice is required. The only authority

cited in this section of respondent's brief is *In the Matter of Glasser*, *supra*, 1 Cal. State Bar Ct. Rptr. 163, which deals with the sufficiency of a notice to show cause when challenged by a respondent attorney on a motion to dismiss, as previously stated. *Glasser* does not indicate that an attorney in disciplinary proceedings must be given advance notice before any of the attorney's statements made during the proceedings may be found to be dishonest and considered in aggravation. We therefore reject respondent's argument.

APPROPRIATE DEGREE OF DISCIPLINE

In determining the degree of discipline to recommend, we consider the standards, which serve as guidelines, as well as prior decisions imposing discipline based on similar facts (*In re Morse*, *supra*, 11 Cal.4th at pp. 206-207; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580), always keeping in mind that the primary purposes of the disciplinary proceedings are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal profession (*In re Morse*, *supra*, 11 Cal.4th at pp. 205-206; std. 1.3 [primary purposes of State Bar disciplinary proceedings are protection of public, courts, and legal profession; maintenance of high professional standards by attorneys; and preservation of public confidence in legal profession].) No fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Instead, we determine the appropriate discipline in light of all relevant circumstances. (*Gary v. State Bar*, *supra*, 44 Cal.3d at p. 828.)

As our opinion indicates, we have found respondent culpable of one additional charged violation not found by the hearing judge. Of the charged misconduct, respondent has been found culpable of one count each of willfully: (1) charging an illegal fee; (2) failing to release a client's file promptly upon request; (3) sharing legal fees with a nonattorney; (4) forming a law partnership with a nonattorney; (5) failing to deliver promptly upon request funds the client was entitled to receive; (6) failing to render an accounting to the client; (7) failing to respond promptly to reasonable status inquiries of the client; and (8) solicitation of a prospective client. He has also been found culpable of two charged counts of intentionally, recklessly, or repeatedly failing to perform services competently and three charged counts of failing to return unearned fees promptly. Thus, taken together, respondent has been found culpable of thirteen counts of charged misconduct involving five separate clients and two separate non-clients. Respondent committed these thirteen violations in seven separate matters over a period of nearly four years,[26] and as we previously indicated, respondent's misconduct began less than two years after he was admitted to practice law. Hence, as of the end of the period of misconduct with which we are concerned, respondent had been committing misconduct in the practice of law for double the amount of time he had practiced without committing misconduct. We note additionally that respondent's misconduct includes ten different violations of the rules and codes governing attorneys, quite a wide range of misconduct.

[26]The misconduct charged in this case began in early 1993, and the record reflects that respondent failed to refund the unearned fee in the Benjamin matter, even after Benjamin was awarded the money in arbitration, until February 1997.

In addition, the record reflects only slight evidence in mitigation, but serious, extensive evidence in aggravation.[27] As noted in our discussion of aggravation, respondent's misconduct was surrounded by considerable dishonesty, concealment, overreaching, and several other uncharged violations of the State Bar Act and Rules of Professional Conduct. Respondent displayed indifference toward rectification of or atonement for the consequences of his misconduct as well as a lack of candor during disciplinary investigation and proceedings, both to clients and to the State Bar. Moreover, it appears from the record that several of respondent's clients were of modest means and apparently modest education, which facts undercut sharply the weight to be given to respondent's mitigation evidence regarding his pro bono work.

Viewing the facts of these matters as a whole, we conclude that respondent has demonstrated clear disrespect for his clients and a nearly complete lack of appreciation for his professional obligations. In two matters, those involving Brown and Chimy, respondent attempted to settle cases without client authority, and in the Chimy matter, without ever having even met the client. Moreover, in the Brown matter, respondent filed a lawsuit on behalf of his former clients against their wishes that he no longer represent them. In addition, respondent waited years before refunding unearned fees to Benjamin and Van Tatenhove and never refunded such fees to Campos. In the Benjamin and Campos matters, respondent spoke to his clients rudely and hung up on them when they requested a refund of unearned fees. In all of the matters except that involving Orozco, respondent ignored correspondence and telephone calls from clients and from other

[27]As indicated, we adopted the vast majority of the hearing judge's findings in aggravation.

counsel regarding respondent's cases, failing either to comply with requests or to respond in any way. In addition, Orozco testified that respondent ignored client appointments in their Santa Ana office, forcing someone else from the office to meet with respondent's clients and reschedule appointments. In sum, besides ignoring his professional duties in general, respondent specifically made a habit of ignoring his clients and their interests. "Client neglect is serious misconduct that constitutes a breach of the fiduciary duty owed by an attorney to the client and, accordingly, warrants substantial discipline. [Citation.]" (*Stanley v. State Bar* (1990) 50 Cal.3d 555, 566.)

In addition, as the hearing judge noted, respondent has demonstrated a willingness to disregard the truth whenever the need arises, including during these proceedings. As previously indicated, respondent initially appeared to admit that Campos was his client, since he failed to deny it upon accusation by the State Bar and indicated in his pretrial statement that Campos's fee had been returned to her, then subsequently testified at the hearing that he believed she was never his client. In addition, respondent fabricated portions of the bill he sent to Van Tatenhove in a dishonest attempt to claim he had earned the $1,000 fee and avoid culpability for failure to return unearned fees. In the Chimy matter, respondent made misrepresentations to the insurance company regarding Chimy's willingness to settle despite the fact that respondent had never met with Chimy.

Additionally, respondent falsely stated in his May 20, 1998 Verified Petition for Interlocutory Review that he had been denied the ability to cross-examine Orozco; falsely stated during a February 12, 1997 telephonic status conference to a hearing judge that he had filed an answer to the second amended NDC, then filed a Motion for Extension of Time to File Answer on February 27, 1997; and misstated in his Motion to Put Oneself in Contempt filed on February 20, 1998, that the hearing judge imposed various sanctions for his assertion of various constitutional and statutory privileges on February 19, 1998, when the hearing judge indicated on that date that

he would consider certain sanctions, but the only sanction imposed was the waiver of the requirement that the State Bar lay a foundation as to respondent's State Bar registration card.

As the foregoing demonstrates, respondent is entirely willing to make false statements to clients, to opposing parties, and to courts when it will suit his purposes. Accordingly, he has "violated ' " 'the fundamental rule of [legal] ethics–that of common honesty–without which the profession is worse than valueless in the place it holds in the administration of justice' . . . ." ' [Citation.]" (*In re Menna* (1995) 11 Cal.4th 975, 989.)

In addition, as the hearing judge noted, respondent does not appear to exhibit any remorse or even recognition of his wrongdoing. (See *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1036-1037; *In re Rivas* (1989) 49 Cal.3d 794, 802.)

In recommending respondent's disbarment, the hearing judge relied in part upon *In the Matter of Brimberry*, *supra*, 3 Cal. State Bar Ct. Rptr. 390. In that case, Brimberry was found culpable of serious misconduct in four matters. As here, Brimberry had no prior record of discipline, her misconduct commenced soon after being admitted to practice, there was significant evidence in aggravation but little in mitigation, and the mitigation was substantially discounted. Also as found in this case, Brimberry showed that she was willing to disregard the truth whenever the need arose, "overreached her clients for her personal benefit" (*id*. at pp. 403-404), and demonstrated a complete lack of recognition of the duties of an attorney (*id*. at p. 405). As a result, we concluded that "[o]nly a disbarment recommendation can give the level of protection we believe the public and the courts deserve in this case. We strongly believe that [Brimberry] should not practice law again without proving her rehabilitation and fitness to practice by clear and convincing evidence of sustained exemplary conduct as is required in a formal reinstatement proceeding. [Citation.]" (*Ibid*.) While the misconduct in *Brimberry* was more serious because in three matters Brimberry effectively "became an advocate against her client, unabashedly disregarding her clients' instructions in order to maximize her fees" (*ibid*.), respondent has

demonstrated a similar reckless disregard of the truth and protracted failure, or refusal, to recognize the duties of an attorney. In addition, in the present case, respondent is culpable of more misconduct which began earlier after being admitted to practice law.

We are also guided by *Chang v. State Bar* (1989) 49 Cal.3d 114. In that case, Chang was found culpable of misappropriating client funds, failing to render an accounting to his client, and making misrepresentations to his client and to the State Bar. (*Id*. at pp. 123-124, 127-128.) In determining that Chang should be disbarred, the court focused upon his lack of candor to the State Bar's investigator and the State Bar Court, the seriousness of the misconduct, and the lack of mitigating evidence. (*Id*. at pp. 128-129.) Although the court emphasized that Chang's misappropriation of over $7,000 constituted serious misconduct, Chang's violations committed in a single client matter "appear[ed] to be an isolated instance of misappropriation" (*id*. at p. 129), and therefore respondent's numerous acts of misconduct, committed over a period of four years, appeared to be more serious. As in the present case, in mitigation, Chang had no prior disciplinary record, yet he never acknowledged the impropriety of his conduct and demonstrated a lack of candor before the State Bar, manifesting "a disrespect for the bar's authority." (*Id*. at pp. 128-129.) The court concluded that "[t]he risk that [Chang] may engage in other professional misconduct if allowed to continue practicing law is sufficiently high to warrant his disbarment. [Citations.]" (*Id*. at p. 129.)

This court has previously noted that in cases involving extensive misconduct "in which the attorney had no prior discipline and in which intentionally dishonest acts, such as misrepresentations and misappropriation of client funds, were not the essence of the disciplinary charges," suspension has generally been deemed adequate only where the attorney presented evidence of a tragic event or set of circumstances which altered and explained the attorney's conduct, as well as sufficient evidence of rehabilitation to give the court confidence that the

misconduct would not be repeated. (*In the Matter of Hindin*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 687.) Respondent presented no such evidence here.

In view of the foregoing, we conclude, as we must, that aggravating circumstances overwhelmingly outweigh the minute evidence of mitigation presented. Given that the misconduct itself was serious and repeated, lasting for double the amount of time respondent practiced law before his misconduct commenced, we conclude that respondent poses a significant threat of harm to the public and the legal profession. "It is the protection of the public and the integrity of the legal profession which is here at stake, and when it is shown as here that those interests are endangered by the character of the attorney before us, our responsibility and duty require that we act in order to prevent that danger from bearing fruit in the form of future harm." (*Tomlinson v. State Bar* (1975) 13 Cal.3d 567, 579.) Even if the misconduct here did not occur because respondent consciously disregarded his professional obligations, but rather because he was oblivious to them, we nevertheless "have great concern that respondent's lack of understanding of his obligations as an attorney poses risks to the public." (*In the Matter of Doran* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871, 881.) In view of respondent's repeated disregard of his clients' interests and of his professional duties, as well as his willingness to disregard the truth, we agree with the hearing judge's conclusion that there is a great likelihood that respondent will engage in misconduct in the future. Consequently, we recommend that respondent be disbarred.

RECOMMENDATION

For the foregoing reasons, we adopt the recommendation of the hearing judge that respondent Emir Phillips be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of persons admitted to practice in this state. We further recommend that respondent be ordered to comply with the provisions of California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within

30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We further recommend that the State Bar be awarded costs in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

STOVITZ, J.

We concur:

Obrien, P. J.
Talcott, J.*

*Talcott, J. sat in place of Watai, J., who was disqualified.

*Hearing Judge of the State Bar Court assigned by the Presiding Judge under rule 305(e) of the Rules of Procedure of the State Bar.

Case No. 94-O-11471

In the Matter of Emir Phillips

Hearing Judge

Carlos E. Velarde

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